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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN PENNA, Plaintiff and Appellant, v. NECATI ERGUR, Defendant and Respondent.	A103808, A103997 (San Mateo County Super. Ct. No. CIV421177)

Appellant John Penna's action against respondent Necati Ergur was dismissed for his failure to appear at a court-ordered hearing to show cause why he failed to proceed with court-ordered arbitration. Appellant's motion for relief under Code of Civil Procedure section 473[1] was denied, as was his subsequent motion for reconsideration. (§ 1008.) Finding appellant was entitled to relief under section 473, we shall reverse the judgment of dismissal and related order awarding attorney fees and costs.

FACTS AND PROCEEDINGS BELOW

Appellant commenced this action for breach of a promissory note on March 8, 2002. On July 26, 2002, the Arbitration Administrator of the San Mateo County Superior Court assigned the case to an arbitrator and set October 9, 2002 as the date for the arbitration hearing. Shortly before the date set, counsel for appellant sought and received a postponement of the arbitration.

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[1] All statutory references are to the Code of Civil Procedure.

On February 28, 2003, respondent filed a motion for sanctions against appellant for his alleged failure to comply with a discovery order unrelated to arbitration.[2] A hearing on the motion before Superior Court Judge Rosemary Pfeiffer was noticed for April 10, 2003, but for reasons that shall appear the hearing was never held and the motion for discovery sanctions has never been decided.

On March 4, 2003, four days after respondent filed the motion for discovery sanctions noticed before Judge Pfeiffer, Superior Court Judge Quentin L. Kopp, who presided over the San Mateo County Superior Court's "case management calendar," sua sponte served the parties a "Notice of Order to Show Cause Hearing for Failure to Complete Arbitration." After noting that the case had been ordered to arbitration, that the jurisdiction of the arbitrator expired on November 7, 2002 and had not been extended, and that no arbitration order had been filed, the order declared that a show cause hearing for failure to complete arbitration would be held on April 3, 2003 at 9:00 a.m. in Department 6.

Appellant's counsel did not show up at the appointed time and place. Noting that "[p]laintiff has failed to appear in response to the order to show cause," Judge Kopp stated that "therefore, the court dismisses the action." The court did not thereafter issue a formal court order dismissing the action, and the minute order, which was not served on the parties, simply states "Case dismissed."

On May 1, 2003, appellant's counsel filed a motion for relief from the dismissal pursuant to section 473. In an affidavit supporting the motion, which we later describe

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[2] The motion was made "on the grounds that on September 18, 2002, Plaintiff abruptly and without cause left his deposition. Further, Plaintiff willfully refused to produce requested documents. Defendant then filed a motion to compel attendance at deposition and production of documents on November 26, 2002. This motion was granted on December 17, 2002, and Plaintiff was ordered to produce the documents within 10 days and make himself available for deposition within 20 days. The deposition was renoticed for January 6, 2003. Plaintiff failed to comply with the Court's order by producing the requested documents by December 27, 2002, and the deposition was cancelled for failure to comply with the Court's discovery order. Plaintiff continues to refuse to produce the requested documents."

more fully, counsel explained that his failure to attend the April 3rd hearing was "due to a calendaring mistake." The trial court denied the motion on May 29, 2003, stating from the bench that the representation of appellant's counsel that he miscalendared the matter "is not acceptable to the court," and the court's explanation was reiterated in the minute order.[3]

On June 23, 2003, the court issued a written order denying appellant's motion for relief under section 473, and also a Judgment After Dismissal of Action awarding respondent attorney fees of $14,625 and costs in the amount of $464.27. Neither the order nor the judgment was served on appellant.

On July 31, 2003, appellant's counsel filed a motion for reconsideration (§ 1008, subds. (a) and (b)) on the ground, among others, that at the time of the hearing on appellant's motion for relief from dismissal counsel received no prior notice appellant's action might be, as it was, dismissed on the basis of appellant's and counsel's conduct regarding discovery and arbitration and justifiably believed the case was dismissed only because of his failure to appear at the order to show cause hearing on April 3rd. Had he received notice, counsel maintained, he would have addressed these other issues in his section 473 motion for relief. In a lengthy declaration, appellant's counsel asserted that he contacted respondent's counsel in an attempt to reschedule arbitration but was unsuccessful. He and his client "engaged in good faith discovery practice" and were prepared to complete discovery with dispatch and participate in arbitration. Counsel also reiterated that the failure to properly calendar the order to show cause hearing of April 3, 2003 was his alone and could not in any way be attributed to his client.

On September 10, 2003, the trial court denied appellant's motion for reconsideration. The court's order, which was prepared by counsel for respondent, states

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[3] Curiously, the minute order also notes that appellant failed to appear at the April 10, 2003 hearing on respondent's motion for discovery sanctions, but that motion was to be heard on April 10th by Superior Court Judge Rosemary Pfeiffer, whose minute order of that date states that there were "no appearances" because the case had been "[d]ismissed by Judge Kopp."

that appellant "has not met his burden to show new or different facts, circumstances or law sufficient to warrant or support reconsideration of the prior order," that the order to show cause was based upon appellant's failure to engage in court-ordered arbitration or obtain an extension of time to arbitrate, and that these failures "were sufficient and independent reasons for dismissal over and above" appellant's failure to appear at the order to show cause hearing on those issues.[4] Additionally, the court found that appellant "has failed to sustain his burden of proof to show that the facts leading to dismissal were caused by Plaintiff's attorney's mistake, inadvertence, surprise, or neglect within the meaning of CCP 473(b). Further, and as a separate matter, the actions of Plaintiff's attorney have not been shown to be excusable."

Appellant timely appealed from the April 3, 2003 order of dismissal and June 23, 2003 judgment after dismissal (which included an award of attorney fees and costs), and the June 23, 2003 order denying relief from dismissal pursuant to section 473 (A103808); and from the September 10, 2003 order denying reconsideration (A103997).[5] As we determine that the trial court erred by denying relief pursuant to section 473, and reverse on that ground, it is unnecessary to decide the propriety of the denial of reconsideration.

DISCUSSION

Under subdivision (b) of section 473, a trial court may, on any terms as may be just, relieve a party from a judgment, dismissal, order, or other proceeding taken against him or her through mistake, inadvertence, surprise, or excusable neglect. "It is well established that ' "a motion for relief under . . . section 473 is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof the exercise of that discretion will not be disturbed on appeal." ' [Citations.] That discretion, however, ' "is not a capricious or arbitrary discretion, but an impartial discretion, guided

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[4] This statement assumes counsel's failure to engage in arbitration or obtain a continuance provides a basis upon which his action could be dismissed without a hearing.

[5] The appeal from the order of dismissal (A103808) was consolidated with the separate appeal from the order denying reconsideration (A103997).

and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' [Citations.]" (*Carroll v. Abbott Laboratories, Inc*. (1982) 32 Cal.3d 892, 897-898.)

Subdivision (b) of section 473 includes an "attorney affidavit" provision which provides in pertinent part as follows: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is [timely], is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any . . . resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect." Whenever relief is granted on the basis of such an affidavit, the court shall "direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties," in addition to whatever additional fees may be authorized by subdivision (c) of the statute. "Under this provision, then, a party is relieved from the consequences of his or her attorney's mistake, inadvertence, surprise, or neglect, and relief is available *regardless of whether the attorney's neglect is excusable*. [Citations.] *If the requirements of this provision are met, then relief is mandatory*, and the mandatory provisions of section 473 may be used by counsel to seek relief from failure to oppose a motion to dismiss. [Citations.]" (*J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, 1492, italics added.)

In support of his motion for relief under section 473, appellant submitted the affidavit of his counsel which, in material part, states as follows: "Plaintiff's . . . complaint was dismissed due to my mistake, inadvertence, surprise and excusable neglect in that I failed to attend the Thursday, April 3, 2003, Order to Show Cause [hearing] due to a calendaring mistake. I calendared said hearing for Friday, April 4, 2003, instead of the correct date. Due to my failure to attend said hearing, plaintiff's complaint was dismissed. I inadvertently entered the hearing for Friday, instead of the correct day of

Thursday. [¶] I am unaware if there is a written order dismissing this matter. Thus, I have not been served with the order dismissing the subject complaint. I learned that this matter was dismissed while attempting to attend the hearing on April 4, 2003. Specifically, while driving from my office to the court on April 4, 2003, I called the court in advance to ensure that I had the correct department for the hearing. I reached one of the civil clerks who, after I provided the case name and number, informed me that this matter had been dismissed the day before, April 3, 2003, due to my failure to attend the OSC hearing. That was when I learned that I had mis-calendared the hearing date."

Respondent's opposition to appellant's motion for relief focused almost entirely on appellant's alleged "obstinate refusal" to participate in arbitration and obstruction of discovery "in defiance of court order." The affidavit of respondent's counsel consists for the most part of a reiteration of the claims set forth in respondent's motion for sanctions for abuse of discovery which was to be heard on April 10th before Judge Pfeiffer; indeed, respondent's counsel's affidavit in support of his motion for discovery sanctions was attached as an exhibit to his opposition to appellant's section 473 motion for relief from dismissal. Respondent's only reaction to appellant's counsel's statement that his failure to appear at the order to show cause hearing was the result of his own "calendaring mistake" was that this "feeble excuse . . . is not credible since [appellant's counsel] was twice notified of the date."

At a very short hearing on the motion for relief held on May 29, 2003, the parties submitted the matter on the basis of the motion papers. Ruling from the bench, the court denied the motion, finding "that there were opportunities twice to plaintiff to respond to the court's order to show cause why the case should not be dismissed. [¶] Plaintiff argues that plaintiff miscalendared the matter. The court finds that that representation [explaining counsel's failure to appear] is not acceptable to the court. Besides the clerk of the court's notice of the April 3rd hearing and the order to show cause why the case shouldn't be dismissed for failure to complete arbitration, there was additional notice in the form of . . . the defendant's declaration in response to the order to show cause for

failure to complete arbitration. Which means that there were two notices of an April 3, 2003 hearing. So the motion is denied."

On June 23, 2003, the trial court issued a formal order denying appellant's section 473 motion. This ruling indicated that the motion was denied not simply because "[t]he explanation of [appellant's] attorney [that] he failed to attend the Order to Show Cause Hearing because of mis-calendaring is not convincing"; but for the *additional* reasons that appellant "willfully refused to obey the Court's order to proceed with arbitration"; and "failed to obey discovery orders of the Court previously issued, has obstructed and delayed discovery, and has exceeded the fast track guidelines of this court."

In his later motion for reconsideration of the order denying relief, and at the August 21, 2003 hearing on that motion, appellant's counsel argued that at the time he filed the motion for relief he justifiably assumed that the *only* issue presented was his failure to attend the April 3rd hearing on the order to show cause, and he had never been provided an opportunity to show that he did not refuse to arbitrate, obstruct discovery, or violate the court's fast track guidelines. As counsel pointed out, the one-page transcript of the April 3rd hearing he failed to attend shows that, as he had been told by a court clerk, dismissal was ordered simply because appellant did not appear at the hearing. At the April 3rd hearing, the court explained its ruling as follows: "There's proof of service by mail of the order to show cause on plaintiff's attorney of record on March 4, 2003. The court notes that plaintiff has filed no showing of good cause not to dismiss the action. *Plaintiff has failed to appear in response to the order to show cause, and therefore, the court dismisses the action*." The minute order relating to the April 3rd hearing, which was not served on the parties, states only "[c]ase dismissed" with no reasons given, and, so far as the record shows, the court never issued a formal order dismissing the action. In short, the only document in the record contemporaneously memorializing the reason for the trial court's dismissal of the action, the transcript of the April 3rd hearing, indicates that appellant's action was dismissed only because of his failure to appear at the hearing on the order to show cause.

I.

Appellant is Statutorily Entitled to Relief From the Dismissal Ordered on the Basis of His Failure to Appear at the Hearing on the Order to Show Cause

As previously indicated, subdivision (b) of section 473 may be used by an attorney to obtain relief from his or her failure to appear at a hearing at which a client's action is dismissed "regardless of whether the attorney's neglect is excusable." (*J.A.T. Entertainment, Inc. v. Reed, supra,* 62 Cal.App.4th at p. 1492, citing *Lorenz v. Commercial Acceptance Ins. Co*. (1995) 40 Cal.App.4th 981, 989; *Metropolitan Service Corp. v. Casa de Palms, Ltd*. (1995) 31 Cal.App.4th 1481, 1487.) "If an application for relief is made no more than 6 months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his mistake, inadvertence, surprise, or neglect, the court *must* vacate . . . any resulting default judgment or dismissal entered against the client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect. . . . [¶] . . . A declaration by an attorney establishing that a default, default judgment or dismissal was entered against his or her client as the result of attorney neglect deprives the trial court of discretion to deny relief, even without a showing that the neglect was excusable. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 196, at pp. 702-703, citing *Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 256; *Tackett v. Huntington Beach* (1994) 22 Cal.App.4th 60, 64; *Metropolitan Service Corp. v. Casa de Palms, Ltd., supra*, 31 Cal.App.4th at p. 1487; accord, *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681 ["The mandatory provision was added by amendment [to section 473] in 1991 to provide relief to the client even when the attorney's mistake or neglect *was not excusable*" (italics added)].)

Appellant's counsel's affidavit, which was never challenged by respondent or the trial court, satisfies all of the requirements; it was made less than six months after dismissal of the action, is in proper form, attests to counsel's inadvertence and mistake, and asserts that counsel's mistake cannot in any way be attributed to appellant. The trial court's statement that "[t]he explanation of [appellant's] attorney [that] he failed to attend

the Order to Show Cause Hearing because of mis-calendaring is not convincing" is no more than a determination that counsel's conduct was inexcusable. Such a determination exceeds the scope of judicial discretion permitted by subdivision (b) of section 473, which mandates relief in the circumstances presented by this case.

Because appellant was entitled to relief from dismissal of his action for his failure to appear at the order to show cause hearing, the dismissal cannot alternatively be sustained on the basis of his refusal to participate in arbitration, as respondent argues, because that was the issue to be adjudicated at the hearing counsel neglected to attend. If the trial court's post hoc determination that appellant refused to arbitrate were permitted to stand, the relief appellant is entitled to under section 473 would be meaningless.

Furthermore, and very significantly, the order of dismissal could not be sustained on the basis of appellant's refusal to participate in arbitration entirely apart from the facts that that issue was never adjudicated and the action was not genuinely dismissed for that reason. Though the refusal to participate in arbitration may subject a plaintiff to other sanctions, it does not provide a legal basis upon which to dismiss his or her action. As the Supreme Court stated in *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, "[t]he Legislature chose not to provide for dismissal as a sanction if a party refuses to participate [in arbitration]. Rather, it authorized a court to impose additional costs and attorney fees on the errant party or his attorney." (*Id*. at p. 919.)[6]

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[6] Respondent endeavors to distinguish *Lyons v. Wickhorst* on the theory that appellant did not "merely" refuse to participate in arbitration, as did the appellant in *Lyons*, but abused the process after agreeing to participate. Respondent relies on the statement in *Lyons* that "a trial court may, under certain circumstances, invoke its limited, inherent discretionary power to dismiss claims with prejudice. [Citation.]" (*Lyons v. Wickhorst, supra*, 42 Cal.3d at p. 915.) However, respondent ignores the sentence following the one he relies upon, which qualifies the power by noting that it has "been confined to two types of situations: (1) the plaintiff has failed to prosecute diligently [citation]; or (2) the complaint has been shown to be 'fictitious or sham' such that the plaintiff has no valid cause of action [citation]." (*Ibid*.) It is not alleged and the trial court did not find that either situation exists in this case. (Compare, *Pearlson v. Does 1 to 646* (1999) 76 Cal.App.4th 1005.)

II.

Denial of Relief Cannot be Justified by Appellant's Alleged Obstruction of Discovery

Aware we might find that the trial court erred in refusing to accord appellant relief under section 473 because of his failure to appear at the order to show cause hearing or refusal to participate in arbitration, respondent endeavors to persuade us that "numerous other sufficient and proper bases existed for the dismissal," namely, appellant's obstruction of discovery in violation of court orders. We need not spend much time disposing of this claim.

Appellant's alleged obstruction of discovery had nothing to do with issuance of the order to show cause, and it was not a reason Judge Kopp ordered dismissal of appellant's action.[7] Moreover, as we have explained, appellant's claimed failure to comply with discovery orders was the subject of respondent's motion for sanctions, which was noticed for hearing before Judge Pfeiffer, not Judge Kopp, who presided over the case management calendar. The hearing scheduled for April 10th before Judge Pfeiffer was never held because, a week earlier, Judge Kopp dismissed the action. (See, *ante*, p. 3, fn. 3.) In effect, respondent urges us to sustain a motion—for terminating sanctions for the abuse of discovery—that was never adjudicated in the trial court. We decline to do so. Dismissal is a proper sanction to punish the failure to comply with a discovery order "only if the court's authority cannot be vindicated through the imposition of a less severe alternative." (*Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331; citing *Lyons v. Wickhorst, supra*, 42 Cal.3d 911, 917; *People v. Lockwood* (1998) 66 Cal.App.4th 222, 230; *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 64; *Peterson v. City of Vallejo* (1968) 259 Cal.App.2d 757, 782.) We cannot simply assume that a penalty less severe than dismissal would be inefficacious in this case.

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[7] Judge Kopp did rely on the obstruction of discovery as a ground for the denial of appellant's motion for relief from the dismissal, but such post hoc reliance on an issue never presented by the order to show cause and committed to another judge was clearly improper.

DISPOSITION

The judgment, including the award of attorney fees and costs, is reversed and the case is remanded to the superior court for further proceedings in accordance with this opinion. Appellant to recover his costs on appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.